

Blackfoot Travel Plan – Objection of the Continental Divide Trail Society

The Continental Divide Trail Society¹, in accordance with 36 CFR § 218.8, hereby submits an objection to the Blackfoot Travel Plan. This submission relates to issues involving the authorization of mountain bike use along the Continental Divide National Scenic Trail – specifically in the segment between the Scapegoat Wilderness and Rogers Pass.

The Society discussed its concerns in its scoping comments of December 30, 2010 and its comments of March 1, 2013 on the proposed Blackfoot Travel Plan.²

In the scoping comments (quoted at length in the 2013 comments), we set out the key provision of the 2009 CDNST Comprehensive Plan, that “the nature and purposes of the CDNST are to provide for high-quality scenic, primitive hiking and horseback riding opportunities and to conserve natural, historic, and cultural resources along the CDNST corridor.”³ We included several citations to the legislative background of the CDNST designation that indicate that the Trail would be “a simple facility for foot and horseback use in keeping with the National Scenic Trail concept as seen in the Appalachian and Pacific Crest Trails,” one that would offer an “intimate experience” to those who walk or ride horseback along it.⁴

Nevertheless, as provided in the Comprehensive Plan, “bicycle use may be allowed on the CDNST (16 U.S.C. § 1246(c))⁵ if the use is consistent with the applicable land and resource management plan and will not substantially interfere with the nature and purposes of the CDNST.”⁶

It is important to distinguish between “interference” and “substantial interference” with the nature and purposes of the Trail. We explained the difference in the scoping comments as follows:

This standard, in our judgment, calls for a careful balance. Interference with the nature and purposes of the trail is most substantial in areas that are natural, scenic, and undisturbed. We regard any mechanized or motorized use in such areas to be incompatible with the nature and purposes of the trail. Segments that lack significant attributes of this character, with little to prompt the passing hiker to pause and enjoy

¹ The mission of the Continental Divide Trail Society, established in 1978, is to help in the planning, development, and maintenance of the CDNST as a silent trail and to assist users plan and enjoy their experiences along the route. We have approximately 250 members, from all parts of the United States and several countries overseas. Members of our Society hike the CDNST, including portions within the Helena National Forest, every year.

² These comments are appended as Attachment A (scoping, commenter 196) and Attachment B (comments on draft proposed plan, commenter 114).

³ Comprehensive Plan, II.A, p.4. The Forest Service Manual calls for the administration of national scenic trail corridors to be compatible with the nature and purposes of the corresponding trail; for the CDNST, the nature and purposes are set out in the identical language of the Comprehensive Plan. FSM 2353.42.

⁴ See Attachment A for the full discussion in our scoping comments, also included in our comments on the proposed Blackfoot Travel Plan.

⁵ “Other uses along the trail, which will not substantially interfere with the nature and purposes of the trail, may be permitted by the Secretary charged with the administration of the trail. ... Other uses along the ... Continental Divide National Scenic Trail, which will not substantially interfere with the nature and purposes of the Trail, and which, at the time of designation, are allowed by administrative regulations, including the use of motorized vehicles, shall be permitted by the Secretary charged with administration of the trail.”

⁶ Comprehensive Plan, IV.5.b.(2), p.15. The Forest Service Manual restates this policy at FSM 2353.44b 10.

his or her surroundings, might be opened to bicycles use as not “substantially” interfering with the nature and purposes of the Trail.

Keeping these principles in mind, our comments on the proposed travel plan took exception to DEIS Alternatives 1 and 2. However, we found that while we might not agree with every aspect of Alternative 3, we regarded it as being consistent with the Comprehensive Plan and therefore suitable for adoption. With respect to the segment from Scapegoat Wilderness to Rogers Pass, we concurred with the limitation to foot and stock use only. South of Flesher Pass, we indicated that bicycle use might not result in such “substantial” interference as to require its prohibition. We took an intermediate position with respect to the segment from Rogers Pass to Flesher Pass: that although Alternative 3 would allow bicycle use, we requested that the Forest Service reexamine the issue (especially from Anaconda Hill north) because bicycle use there may “diminish the opportunity for solitude and primitive recreation.”

We continue to urge you to review allowable uses in the section between Rogers Pass and Anaconda Hill. However, in view of our advice that Alternative 3 was acceptable, we do not include this segment in our objection.

We do object, however, to the proposed selection of Alternative 4 as it relates to mountain bike use in the segment between Scapegoat Wilderness and Rogers Pass.

Compliance with 36 CFR 218.8

1. The objector is James R. Wolf, Director, Continental Divide Trail Society, 3704 N. Charles St. (#601), Baltimore MD 21218. Telephone is 410/235-9610. E-mail address is jim@cdtsociety.org.

2. Signature will be provided upon request.

3. Multiple names are not listed.

4. The name of the documents being objected to is: Blackfoot Travel Plan, Final Environmental Impact Statement (FEIS) and draft Record of Decision (dROD) for the Blackfoot Travel Plan. The responsible official is William Avery, Forest Supervisor.

5. Aspects of the proposed project addressed by the objection, including specific issues related to the proposed project.

- What are the “nature and purposes of the CDNST” and what activities – in particular, what bicycle use – would “substantially interfere” with the nature and purposes of the CDNST?
- Would the authorized use of bicycles along the CDNST in the project area – in particular, between the Scapegoat Wilderness and Rogers Pass – substantially interfere with the nature and purposes of the CDNST?
- Has the Forest Service considered the relevant factors in determining whether or not bicycle use in the project area – in particular, between the Scapegoat Wilderness and Rogers Pass – substantially interferes with the nature and purposes of the CDNST?
- Has the Forest Service provided a reasoned decision that, under Alternative 4, would allow mountain bike use on the CDNST portal trail (between Scapegoat Wilderness and Rogers Pass) while prohibiting mountain bike use on other portal trails?

- Has the Forest Service made a searching and careful inquiry regarding the comments of the objector with respect to mountain bike use between Scapegoat Wilderness and Rogers Pass, and has it responded adequately to those comments in the light of such an inquiry?

How the environmental analysis of draft decision specifically violates law, regulation, or policy.

The plan is inconsistent with the National Trails System Act (16 U.S.C. §§ 1241 et seq.) and policies established thereunder.

This legislation (the Trails Act) provides the framework for designating and managing national scenic trails, to be “so located as to provide for maximum outdoor recreation potential and for the conservation and enjoyment of the nationally significant scenic, historic, natural or cultural qualities of the areas through which such trails may pass.” 16 U.S.C. §1242 (a)(2). In achieving these objectives, the responsible Secretary [Secretary of Agriculture in this case] is directed to prepare a comprehensive plan for the management and use of the trail. 16 U.S.C. §1244 (f). A comprehensive plan has been duly adopted. 74 Fed.Reg. 51116, Oct. 5, 2009. (Additional direction is provided in FSM 2353.44b.)

The comprehensive plan describes the nature and purposes of the CDNST as follows:

The nature and purposes of the CDNST are to provide for high-quality scenic, primitive hiking and horseback riding opportunities and to conserve natural, historic, and cultural resources along the CDNST corridor.⁷

To provide context for this statement, the plan refers to various documents, including the 1976 Study Report that views the Trail as “a simple facility for foot and horseback use in keeping with the National Scenic Trail concept as seen in the Appalachian and Pacific Crest Trails” and a policy memorandum expressing “the intent of the Forest Service that the CDNST will be for non-motorized recreation.” The Trail would offer an “intimate experience” to those who walk or ride horseback along it.⁸

As stated above, we maintain that this standard calls for a careful balance. Interference with the nature and purposes of the trail is most substantial in areas that are natural, scenic, and undisturbed. We regard any mechanized or motorized use in such areas to be incompatible with the nature and purposes of the trail. Segments that lack significant attributes of this character, with little to prompt the passing hiker to pause and enjoy his or her surroundings, might be opened to bicycles use as not “substantially” interfering with the nature and purposes of the Trail.

Our Society’s guidebook describes the section of the Trail north of Rogers Pass as part of its Scapegoat Wilderness Segment – characterized by “spectacular scenery,” with broad expanses of alpine and subalpine country, interspersed with broad mountain valleys with some heavy standards of timber and scattered mountain meadows and parks.⁹ Reflecting new trail construction between Road 490 and Lewis and Clark Pass, we remark on some “excellent” trail along the line of bare cliffs overlooking the

⁷ Comprehensive Plan, II.A, p.4.

⁸ See Appendix A for the full discussion in our scoping comments, also included in our comments on the proposed Blackfoot Travel Plan.

⁹ Wolf, James R., *Guide to the Continental Divide Trail, vol. 1: Northern Montana* (1991), 8 (citing 1972 Scapegoat Wilderness committee report).

Alice Creek Basin and continuing on the ridge, “with good views.”¹⁰ So, we are thoroughly acquainted with the area and have no hesitation in describing its setting as displaying exactly the kind of nationally significant scenic values that the Trails Act seeks to conserve and maximize enjoyment.¹¹

The Forest correctly recognizes that “closing the [wilderness] portal trails to mountain bikers would reduce conflict among non-motorized user groups and minimize wilderness trespass from wheeled non-motorized recreationists.”¹² In the event of such closures, in accordance with Alternative 3, an unknown number of mountain bikers would be displaced, but would have ample alternative non-motorized routes available.¹³ For Alternative 4, an unknown number of mountain bike users would be displaced from all wilderness portal trails *except the CDNST*, but would have ample alternate non-motorized routes available.¹⁴

From these evaluations, it appears that mountain bike users would have ample alternative non-motorized routes available whether they were permitted (Alternative 4) or not permitted (Alternative 3) to ride their bikes on the CDNST portal trail.

If closure of portal trails is generally merited for wilderness portal trails in order to reduce conflict among user groups and minimize wilderness trespass from wheeled non-motorized recreationists, what can possibly be the justification for singling out the hiker and horseman on the CDNST for a lesser standard of enjoyment? Given the CDNST’s nature and purposes to provide a simple facility for these users, it should be treated not merely in the same manner – but with even greater solicitude – as the other portal trails.

The provision of the Comprehensive Plan that “bicycle use *may be* allowed ... if the use ... will not substantially interfere with the nature and purposes of the CDNST”¹⁵ gives rise to no presumption that mountain bike use is appropriate. What it does intend is that there should be a reasoned and expressed determination by the Forest, in the light of the history of the Trail (including its legislative history), whether or not the interference is “substantial.”¹⁶

We have described above the Society’s understanding of the standards that might be used in making such a determination. We have not objected to mountain bike use on much more than half of the CDNST in the project area. But in the roughly 16 miles between the Scapegoat Wilderness and Rogers Pass (and especially the eight miles between the Wilderness boundary and Lewis and Clark Pass), there should be no doubt that the balance calls for mountain bike use to be denied.

In the draft record of decision, it is noted that “most of the CDNST within the planning area currently receives light mountain bike use. Should the popularity of the trail increase significantly among mountain bike users, it may be necessary to adjust management of the trail in the future so that hikers

¹⁰ Wolf, James R., *Guide to the Continental Divide Trail*, vol. 2 (2005), (Appendix A, Northern Montana Supplement), 109.

¹¹ While we consider this characterization as appropriate for the entire section from Scapegoat Wilderness to Rogers Pass, the transmission lines at Cadotte Pass and the proximity of the highway at Rogers Pass might be a basis for a different management approach between Lewis and Clark Pass and Highway 200.

¹² FEIS, pp. 80, 204, 212.

¹³ FEIS, p. 214.

¹⁴ FEIS, p. 217

¹⁵ Comprehensive Plan, IV.B.5.b.(2) [p.15]

¹⁶ The “substantially interfere” standard is derived from Section 7(c) of the Trails Act, 16 U.S.C. § 1246(c).

and horseback riders are provided a high-quality recreational opportunity without excessive numbers of bicyclists.” For the segments south of Rogers Pass, we consider this to a useful caveat even though some terms (“increase significantly” and “excessive numbers”) may be too indefinite to implement: there would need to be numerical monitoring criteria and procedures that would set the stage for limitations on mountain bike use. However, at some point, we must not let the camel’s nose into the tent. Once any use is officially authorized in a setting such as the CDNST wilderness portal, we foresee the near-impossibility of prohibiting its continuation. At the very least, it would require a further environmental assessment, with many of the same values and issues that are at stake today.

In this regard, it should be pointed out that the current review constitutes the first administrative action with respect to the allowance or limitation of bicycle use on the CDNST in the Helena National Forest. Under current policy, a project to define the location of a trail segment calls for a description (a location report) that includes the identification of “any uses that are prohibited.”¹⁷ Further, the management direction of Chapter IV of the Comprehensive Plan (including its statement of CDNST nature and purposes) is to be used in the development of specific prescriptions as land management plans are revised.¹⁸ According to the policy set out in the Forest Service Manual, this would be accomplished in a CDNST unit plan that must, among other things, “identify uses that are prohibited on the segments of the CDNST that traverse that unit.”¹⁹ The CDNST was not specifically discussed in the Helena National Forest Plan and provided no direction with respect to mountain bike use.²⁰ There has been no location report or unit plan pursuant to these provisions.

In other words, the Forest is here working with a clean slate. It is called upon to decide whether or not any or all mountain bike use substantially interferes with the nature and purposes of the Trail. Had there been prior explicit authorization of any use, this would change the context for review. The earlier authorization would imply a finding by the Forest that at least some undefined level of bicycle use on the portal trail was consistent with the nature and purposes of the Trail: the question would then be whether or not an existing permitted use should be prohibited. By the same token, adoption of Alternative 4 would have the same effect. It would place a burden on hikers and horsemen, as well as the Forest Service,²¹ to demonstrate at a later date the existence of substantial interference. Once bike use has been grandfathered, we regard it as highly unlikely the Forest Service would undertake a fresh environmental review and that the bicycle use would ever be restricted – particularly in the absence of numerical and other criteria in the Travel Plan that would be applied in considering such action. The Forest Service must not ignore such a probable though uncertain effect of adopting Alternative 4.²² And, even if some *de minimis* bike travel is all that is anticipated, there is no obligation on the part of the

¹⁷ Comprehensive Plan III.F.2.b.(2)(c), p.7.

¹⁸ *Id.*, III.E.

¹⁹ FSM 2353.44b.2.c.

²⁰ FEIS, Appendix J, p. 325 (PCS 317).

²¹ An agency changing course ... is obligated to supply a reasoned analysis for the change beyond that which may be required when the agency does not act in the first instance. *Motor Vehicle Manufacturers Assn. of U.S., Inc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 42 (1983).

²² Council on Environmental Quality, *Answers to 40 Most Asked Questions on NEPA Regulations*, 46 Fed.Reg. 18026 (question 18). “The EIS must identify all the indirect effects that are known and make a good faith effort to explain the effects that are not known but are ‘reasonably foreseeable.’ ... in the ordinary course of business, people do make judgments based upon reasonably foreseeable occurrences. ...The agency cannot ignore these uncertain, but probable, effects of its decisions.”

Forest to authorize it: the Plan says that bicycle use may (not must) be allowed.²³ The burden now, particularly in regard to the segment between Scapegoat Wilderness and Rogers Pass, should fall on the advocates of bicycle use to provide a convincing case that any such use will meet the standard in the Comprehensive Plan. That has not been done, and we maintain that it can not be done.

The Forest has declared that mountain bike use should not be authorized on wilderness portal trails. Given the statutory objectives of a national scenic trail, as well as this segment's exceptional scenic qualities, this would be especially true there. Such use would "substantially interfere" with the nature and purposes of the CDNST. It would be inconsistent with the National Trails System Act.

The plan is inconsistent with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq., and policies established thereunder.

In order to be consistent with NEPA, a decision with respect to environmental impacts is reviewable to determine whether it is based "on a consideration of the relevant factors and whether there has been a clear error or judgment."²⁴ In accordance with the Administrative Procedures Act, 5 U.S.C. § 706(2)(A), the decision may be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." A decision is arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view of the product of agency expertise.²⁵ The explanation must articulate "a rational connection between the facts and the choices made."²⁶ To provide the basis for such an explanation, the agency must take a "hard look" at the foreseeable environmental consequences of the proposed action.²⁷

The first thing to be kept in mind is that there must be a legal standard at issue, for otherwise there would be "no law to apply," and thus no basis for APA review.²⁸ Here, the legal standard is the direction in the 2009 CDNST Comprehensive Plan that "bicycle use may be allowed ... if the use ... will not substantially interfere with the nature and purposes of the CDNST." In order to comply with this standard, the relevant factors that must be considered are (1) what are the "nature and purposes of the CDNST" and (2) what activities "substantially interfere" with the nature and purposes.

When we examine the draft record of decision, we are advised that each of the alternatives addressed significant issues, including Continental Divide National Scenic Trail.²⁹ But, in the Rationale for Decision, the most relevant factor – the definition of the nature and purposes of the CDNST in the Comprehensive Plan – is nowhere to be found. Instead, the document asserts that the primary purpose

²³ We read this "as inherently granting the Forest Service authority to prevent [user conflicts] and to execute its planning and land management authority in a preemptive manner." Cf. *Northwest Motorcycle Assn. V. USDA*, 18 F.3d 1468 (9th Cir. 1994) at ¶ 56.

²⁴ *Marsh v. Oregon Nat. Resource Council*, 490 U.S. 360, 378 (1989), citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

²⁵ *Motor Vehicle Manufacturers Assn. of U.S., Inc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

²⁶ *Arrington v. Daniels*, 516 F.3d 1106, 1112 (9th Cir. 2008).

²⁷ *Bering Strait Citizens for Responsible Resource Development v. U.S. Army Corps of Engineers*, 524 F.3d 938, 947 (9th Cir. 2008).

²⁸ See *Citizens to Preserve Overton Park, Inc. v. Volpe*, [401 U. S. 402](#), [401 U. S. 410](#) (1971) (discussing 5 U.S.C. § 701(a)(2)).

²⁹ Draft ROD, p.21.

of this trail is to provide a “continuous, appealing trail route, designed for the hiker and horseman, but compatible with other land uses...” and then goes on to emphasize that the CDNST is to be managed primarily for non-motorized recreational opportunities.³⁰

Actually, that is not the direction of the Comprehensive Plan, but a quotation from the 1976 Study Report.³¹ We certainly concur with the relevance and importance of the Study Report as a guide to the legislative intent with respect to the nature and purposes of the CDNST. But, continuing on in the section about that report in the Comprehensive Plan, we find quite a different emphasis, including that “the Continental Divide Trail would be a simple facility for foot and horseback use in keeping with the National Scenic Trail concept as seen in the Appalachian and Pacific Crest Trails.” As the Study Report characterized the desired experience:

The trail experience on or near the Divide is an intimate one, for one can walk or ride horseback across vast fields of wildflowers and contemplate a story dating from the dawn of earth's history....Along the way, the tranquility of the alpine meadows, verdant forests and semi-desert landscape overwhelms everyone who passes that way. The trail would provide the traveler his best encounter with the Continental Divide — its serenity and pure air — and would supply for every trail traveler some of the world's most sublime scenes.³²

A more faithful statement of the nature and purposes understood by Congress — one that makes no reference to other land uses or motorized travel — is the one that is in the Comprehensive Plan itself. As quoted above, “the nature and purposes of the CDNST are to provide for high-quality scenic, primitive hiking and horseback riding opportunities and to conserve natural, historic, and cultural resources along the CDNST corridor.” If the Appalachian and Pacific Crest Trails are to be used as a benchmark, mountain bikes would scarcely be allowed at all.³³ The Society, though it strives to promote management of the CDNST as a “silent trail,” accepts some mountain bike use — but not in areas that are natural, scenic, and undisturbed.³⁴ Under this standard, and unquestionably under the rules followed by the AT and PCT, mountain bike use on the unspoiled hike on the portal to the Scapegoat Wilderness and in immediate proximity to the Continental Divide itself, would substantially interfere with the nature and purposes of the CDNST. Let the hiker and horseman instead enjoy the scenic, primitive experience that designation as a national scenic trail was intended to assure.

One commenter, with regard to a segment of the CDNST in Colorado, argued that if the Forest Service elected to allow mountain biking while prohibiting motorized vehicles, it was obliged to explain why the former was allowed while the latter generally would not be. The Forest Service responded not by justifying a difference, but by treating motorized and mechanized travel alike: “The commenters are correct in stating that the intent of the CDNST is for hikers and horseback riders. We are taking all

³⁰ *Id.*, pp. 28-29.

³¹ *Continental Divide Trail Study Report*, U.S. Dept. of the Interior, Bureau of Outdoor Recreation, Sept. 1976, p.3.

³² *Id.*, p.18.

³³ “Bicycles, mountain bikes, and wheeled conveyances are not permitted on the Trail or the Trail corridor.” (www.appalachiantrail.org: Regulations and Permits). On the Pacific Crest Trail, the only exception to this closure regards sections that are interim locations on public roads, including forest system roads open to motor vehicles, and at the actual intersections between the PCT and other trails open to mountain bikes.

³⁴ See fuller statement in our scoping comments, quoted above. Mountain bike use might also be prohibited or limited elsewhere if called for by concerns about hiker or horseman safety, resource damage, or user conflict. Cf. *Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445 (9th Cir. 1996).

references to mountain biking out of the proposal and the trails will be designed specifically for horseback riders and hikers.”³⁵

We have not insisted that mechanized travel must always be treated in the same manner as motorized travel. But we pose a similar question. If the Forest allows mountain bike use on the Scapegoat Wilderness-Rogers Pass portal segment while prohibiting such use on other portal trails, it must explain its reasons. The pertinent facts include the legislative and policy considerations relating to these two classes of trail: what is the rational connection between those facts and the choice made to allow mountain bikes on the CDNST, but to prohibit that use on the other portal trails? We can find no reasoned explanation that would answer that question.³⁶

Whether intentionally or not, it seems to us that the Forest has tended to obscure, and inadequately discuss, the nature and purposes of the Trail, including the differences between Alternative 3 and Alternative 4 with respect to the mountain bike issue. The draft Record of Decision identifies FEIS table S-1, table 7 and the resource sections of chapter 3 as addressing CDNST issues and summarizing how each alternative meets the purpose and need for action.³⁷ But, in the absence of a fair discussion of the nature and purposes of the trail in light of its legislative history, none of these references can possibly achieve that result. The dROD includes several sections that should have, but have not, included the guidance of the National Trails System Act – the determination of non-significant forest plan amendment, required disclosures for Congressionally designated areas,³⁸ provision of

³⁵ *Continental Divide National Scenic Trail Environmental Assessment*, Routt National Forest and Arapaho and Roosevelt National Forests, June 8, 2005, Appendix B. The full comment reads:

“The Forest Service fails to distinguish between the use of motorized vehicles, such as dirt bikes, and the use of mechanical vehicles, such as mountain bikes, and to explain why the former are prohibited and the latter are allowed. Pursuant to the NTSA, trails designated there under are intended to be for the use of hikers and horseback riders. Here, the Forest Service proposes to add mountain bikers to this group, where Congress has not. Many CDNST routes are in Wilderness areas where mechanized use is not allowed. Further, the Forest Service must explain the difference between mechanized and motorized use and in a science-based manner explain why the former should be allowed here while the latter is, in general, prohibited. Citations to applicable law and regulation must also be provided. Otherwise, mountain biking should be held to the same restrictions as other wheeled recreational uses. If motorized uses are, as the Forest Service would have it, “non-significant” here, than so too are mechanized uses.”

³⁶ In PCS 146, FEIS, Appendix J, p.286, the Forest observes that “allowing mountain bike use on wilderness portal trails was considered by the IDT and is a component of alternative 4 where this would not conflict with stock use.” Equestrian travel is one of the primary and original intended uses of the CDNST. Mountain bike would appear to represent at least as much of a conflict on the CDNST as elsewhere, particularly since the trail was conceived of as a simple facility for the hiker or horseman. In any event, there appears to be no discussion that would suggest that conflict with stock use is a lesser concern on the CDNST than it would be on other portal trails. On the contrary, the discussion of Alternative 3, which restricts use of non-motorized trails by closing all Scapegoat Wilderness portal trails to mountain bikers, declares that “these portal trails [without distinction between the CDNST and other portal trails] are very popular with stock users whose destination is the Scapegoat Wilderness. Closing the portal trails to mountain bikers would reduce conflict among user groups and minimize wilderness trespass from wheeled non-motorized recreationists.” FEIS, p.204.

³⁷ dROD, p.21.

³⁸ The “Other Required Disclosures” serves to assure that environmental impact statements are integrated with other environmental review laws to the fullest extent possible. 40 CFR § 1502.25. The National Trails System Act is certainly as much of an environmental review law as are many of the other topics addressed under this heading. The identification of “Congressionally Designated Areas” as a possible topic for required disclosures refers to wilderness, wilderness study areas, and national recreation areas (none of which are designated in the planning area), yet omits any reference to national scenic trails (which, of course, includes the designated CDNST). dROD, p. 44.

recreational opportunities, and specific criteria for designation of trails and areas.³⁹ The most relevant criterion in the dROD should be not whether the alternative “will improve the quality of the recreation experience along trails of interest such as the CDNST,”⁴⁰ but whether the alternative is consistent with the nature and purposes of the trail. We readily concur that Alternative 4 greatly improves the quality of the recreation experience by virtue of the prohibition of motorized use between Flesher Pass and Stemple Pass; the criterion might also have been applied to improve the quality of the recreation experience by prohibiting mountain bike use on the CDNST between the Scapegoat Wilderness and Rogers Pass (and perhaps elsewhere), but this was not done.

With respect to the CDNST, Table S-1 (and identical Table 7) purport to evaluate the consistency of alternatives with the intent of the 2009 CDNST Comprehensive Plan and the Forest Plan.⁴¹ From our perspective, the most significant difference between Alternatives 3 and 4 for this purpose is the closure (in Alternative 3) of the Scapegoat portal trail to mountain bike use as contrasted with the authorization of such travel there (in Alternative 4). For both alternatives, the table discusses an approximately 1-mile motorized segment, with the remainder of the CDNST “open to a mix of non-motorized uses depending upon the segment.” This is said to be “consistent with the Comprehensive plan.” The only hint that the segment-related uses may be referring to the prohibition of mountain bikes between Scapegoat Wilderness and Rogers Pass is the omission (for Alternative 3) of Alternative 4’s statement that, apart from certain points of motorized access, all of the CDNST would be open to foot, stock, and mountain bike traffic. Alternative 4 is therefore internally inconsistent because the direction allowing mountain bike use along the entire CDNST no longer has a mix that depends upon the segment. And, it should be noted, the table does not actually declare that allowing mountain bike traffic on *all* non-motorized segments would be consistent with the intent of the Comprehensive Plan.⁴²

The closest the Forest comes to dealing with the issue is its rationale for dismissing from further analysis commenters’ suggestions that mountain bikes not be allowed on the CDNST since they may interfere with the nature and purposes of the trail.⁴³ The Forest claims to have considered this suggestion carefully, but dismissed it from further analysis “because we do not feel the current or anticipated future level of mountain bike use on this trail detracts from the nature and purpose of the CDNST and is consistent with the goals for this area.” Insofar as CDNST comments are concerned, it is

³⁹ The “specific criteria for designation of trails and areas” includes criteria to deal with conflicts between motorized and non-motorized users and among different classes of motor vehicle uses. dROD, p. 48. It would have been proper as well to include criteria dealing with conflicts among different classes of non-motorized users (i.e., between mountain bike users, hikers, and horsemen); this would have afforded an opportunity to deal substantively with such conflicts along the CDNST to explain whether, and to what extent, such conflicts might constitute “substantial interference” with the nature and purposes of the CDNST. This would be appropriate in complying with the general criteria for national forest system trails, which call for consideration, among other things, of “provision of recreational opportunities” and “conflicts among uses of National Forest System lands.” 36 CFR § 215.55.

⁴⁰ dROD, p.21.

⁴¹ FEIS, S-26-27; FEIS 75-76.

⁴² Table S-1 does mention that Alternative 3 would close Scapegoat Wilderness portal trails to mountain bikers, but not in the context of consistency with the intent of the Comprehensive Plan. FEIS S-25. Tables C-3 and C-4 (pp. 114-116) provide additional information about the proposed mountain bike system. With respect to non-motorized segments, Trail 440 (the CDNST, as we understand it) has 15.92 miles open to Mt Bike-Foot-Horse use under Alternative 3 and 13.98 open to these uses under Alternative 4. We do not see why the total for Alternative 4 is less than Alternative 3.

⁴³ FEIS, 54-55.

clear that we were not requesting that mountain bikes be entirely disallowed. We specifically approved such use between Stemple Pass and Flesher Pass and acquiesced (with reservations) in such use between Rogers Pass and Flesher Pass. We took the position that mountain bikes should not be allowed between the Scapegoat Wilderness and Rogers Pass – but the important point here is that we did so in the context of an analysis of the nature and purposes of the trail, including the factors differentiating between conditions that give rise to a “substantial interference” as opposed to interference with lesser significance. The Forest may agree or disagree with the position that we took in interpreting the standard in the Trails Act and the Comprehensive Plan, but it had an obligation to consider it or explain why it should be dismissed from further analysis. The Forest suggests that mountain bike use would be monitored over time and if it becomes “extremely popular” on any or all segments, reconsideration of a closure may be necessary. We do not accept the premise that closure might only be appropriate if currently light mountain bike levels increase and this mode of travel becomes “extremely popular.”⁴⁴ it should simply not be allowed in the first place. Once again, we take this position because mountain bike use on a segment having the scenic and unspoiled characteristics of the route between Scapegoat Wilderness and Rogers Pass is in conflict with the National Trails System Act and the 2009 Comprehensive Plan; and in addition it is an arbitrary and capricious policy, especially when evaluated in the light of the closure of other portal trails that lack the environmental goals set out in the Trails Act.

To be more specific, let us frame this objection clearly as a violation of NEPA. The Forest’s consideration of comments was insufficient because it did not respond to the comments submitted by our Society. One comment attributed to us (PCS 147) is described as follows: “the Forest Service should not allowing [sic] mountain bikes on the CDNST since they interfere with the nature and purposes of the CDNST.” That misrepresents our position. We asserted that mountain bike use should not be allowed in certain areas – ones that are natural, scenic, and undisturbed, such as the trail between the Scapegoat Wilderness and Rogers Pass – because such use would substantially interfere with the nature and purposes of the Trail.⁴⁵ The Forest Service answered inadequately, as if we had proposed a blanket ban on bike use on the entire length of the CDNST in the project area; working on that premise, it responded that this position was not carried forward for detailed analysis. What counts here is that the Forest Service neither presented our argument accurately nor responded to it on its merits, as called for pursuant to NEPA⁴⁶. Nor was such a comment “attached to the final statement.”⁴⁷

⁴⁴ *Ibid.* Also, dROD, p.29.

⁴⁵ On page 4 of our comment letter, we identified “the country abutting the Scapegoat Wilderness [to Rogers Pass] as being “the most undisturbed part of the terrain in the project area.” We advised that Alternative 3 properly restricts travel on the CDNST there to foot and stock and is thereby consistent (as explained on page 2) with the nature and purposes of the trail. Our comment did not specifically disagree with the opening of that segment to mountain bikes because that became an issue only with the presentation of Alternative 4 in the FEIS. 36 CFR § 218.8(c). To the extent that the issue may have been included in Alternative 2, we clearly expressed our disapproval of that alternative (on p.5) on the grounds of its authorization of motorized use and saw no need to present our views regarding mountain bike use once again in that context.

⁴⁶ 40 CFR § 1503.4(a). We have reviewed the responses to all comments attributed to our Society (as commenter 114). Besides PCS 147 (discussed in the text), none of them deal in any substantive manner with our comments regarding mountain bike use on the Scapegoat portal trail. PCS 028 deals with the inconsistency of Alternatives 1 and 2 with FSM 2553.44b. Neither of these alternatives is being brought forward for implementation, so the response (which does not analyze the goals of the CDNST) is beside the point. The same is true for PCS 029. PCS 032, which concerns comments that include the desired management of Scapegoat Wilderness Portal Trails under Alternative 3, received only the brief reply “Thank you for expressing your support for alternative 3.” PCS 033 and PCS 034 also deal with support for Alternative 3 and have nothing else to do with our specific concerns. PCS 133 deals with the balance of motorized and non-motorized uses, not with the issue of mountain bikes. PCS 135

The Council on Environmental Quality regulations implementing NEPA require agencies to “rigorously explore and objectively evaluate” all reasonable alternatives in the environmental impact statement.⁴⁸ In our judgment, the present FEIS neither rigorously explores nor objectively evaluates mountain bike use on the CDNST portal trail. Applying the standards of the Administrative Procedures Act, we conclude that the FEIS and the draft decision made in reliance upon it do not comply with the National Environmental Policy Act.

Suggested remedies that would resolve the objection

The remedy that would resolve the objection would be to close the segment of the CDNST between Scapegoat Wilderness and Rogers Pass to mountain bike use. The CDNST would then be managed in the same manner as the other portal trails. The record of decision should be modified accordingly.

Supporting reasons for the reviewing officer to consider

The reasons for our objection and the suggested remedies have been discussed above at length. We have no additional substantive reasons to offer. However, we wish to express our willingness and desire to discuss our concerns informally with the reviewing officer if this may facilitate a mutually acceptable resolution.

6. Connection between prior specific comments and the content of the objection

- What are the “nature and purposes of the CDNST” and what activities – in particular, what bicycle use – would “substantially interfere” with the nature and purposes of the CDNST?

See Comment Letter, March 1, 2013, p.2. “Bicycle use must ‘not substantially interfere with the nature and purposes of the CDNST.... This standard, in our judgment, calls for a careful balance. Interference with the nature and purposes of the trail is most substantial in areas that are natural, scenic, and undisturbed. We regard any mechanized or motorized use in such areas to be incompatible with the nature and purposes of the trail.” Also, the Comprehensive Plan ... recalls the language of the 1976 CDNST Study Report that recommended establishment of the Trail. ... The Continental Divide Trail would be a simple facility for foot and horseback use in

requests measurement of the alternatives against the Helena Plan, the CDNST Comprehensive Plan, and FSM 2353.44b principles and procedures; the response is that the Forest “carefully considered all options .. to ensure consistency with this policies” – but the FEIS is lacking the necessary analysis and documentation to show that in fact these options had been considered in any systematic fashion (and certainly not with respect to the use of mountain bikes on the Scapegoat portal trail). PCS 140 deals with an amendment that the Society was proposing if Alternatives 1 or 2 were selected; it has no bearing on the mountain bike issue. PCS 239 dealt with snowmobile use and was dismissed because determinations regarding winter use are being addressed in a separate travel plan process. PCS 317 requested that information regarding the CDNST might be included in Appendix A (which deals with Forest Plan direction); but, as the Forest replied, the CDNST was not specifically discussed in the Helena National Forest Plan. PCS 371 relates to additional maps for the CDNST; the Forest responded satisfactorily by referring to the maps in appendix G.

⁴⁷ 40 CFR § 1503.4(b).

⁴⁸ 40 CFR § 1502.14(a).

keeping with the National Scenic Trail concept as seen in the Appalachian and Pacific Crest Trails.’ “

- Would the authorized use of bicycles along the CDNST in the project area – in particular, between the Scapegoat Wilderness and Rogers Pass – substantially interfere with the nature and purposes of the CDNST?

See Scoping Letter, December 30, 2010., p.2. “Interference with the nature and purposes of the trail is most substantial in areas that are natural, scenic, and undisturbed. We regard any mechanized or motorized use in such areas to be incompatible with the nature and purposes of the trail. Within this framework, we wish to submit the following comments and recommendations:

Scapegoat Wilderness to Rogers Pass. We agree that this segment should be nonmotorized and nonmechanized. This is an extension of the Scapegoat Wilderness, with similar scenic vistas as well as historic Lewis and Clark Pass – a very special place indeed.”

See Comment Letter, March 1, 2013, p.4. “Our 2010 submission ... advised you that ‘we regard mountain bike use generally to interfere with the nature and purposes of the CDNST.’ We urged that mountain bike travel not be allowed in two segments: (1) Scapegoat to Rogers Pass, and (2) Rogers Pass to Flesher Pass. ... The most undisturbed part of the terrain in the project area is the country abutting the Scapegoat Wilderness, and Alternative 3 properly restricts travel on the CDNST there to foot and stock.”

- Has the Forest Service considered the relevant factors in determining whether or not bicycle use in the project area – in particular, between the Scapegoat Wilderness and Rogers Pass – substantially interferes with the nature and purposes of the CDNST?

See Comment Letter, March 1, 2013, p.4. “The most undisturbed part of the terrain in the project area is the country abutting the Scapegoat Wilderness, and Alternative 3 properly restricts travel on the CDNST there to foot and stock.” As evidenced by this statement, we viewed Alternative 3 as making an appropriate determination, presumably as a result of considering the relevant factors. This issue only arose when the Forest Service, in Alternative 4 (presented in the FEIS but not in the DEIS), provided that bicycle use would be allowed between Scapegoat Wilderness and Rogers Pass. Accordingly, the issue arose after the designated opportunities for comment.

- Has the Forest Service provided a reasoned decision that, under Alternative 4, would allow mountain bike use on the CDNST portal trail (between Scapegoat Wilderness and Rogers Pass) while prohibiting mountain bike use on other portal trails?

The draft environmental impact statement provided that all the portal trails would be closed to mountain bike travel. It was only in the final environmental impact statement (Alternative 4) that the authorized uses for the CDNST would differ from the authorized uses for the other portal trails. Accordingly, the issue arose after the designated opportunities for comment.

- Has the Forest Service made a searching and careful inquiry regarding the comments of the objector with respect to mountain bike use between Scapegoat Wilderness and Rogers Pass, and has it responded adequately to those comments in the light of such an inquiry?

This issue concerns the adequacy of the Forest Service response to the objector's comments. Obviously, the issue arose after the designated opportunities for comment.

CONCLUSION

While the Continental Divide Trail Society objects emphatically to the proposed action with respect to the segment between Scapegoat Wilderness and Rogers Pass, we commend the Forest Service for its recognition that the continued use of motorized vehicles between Flesher Pass and Stemple Pass would not be consistent with the nature and purposes of the CDNST. And while it is not part of our objection, we take the opportunity to request again, as we did in our comment letter, that the Forest Service reexamine the authorization of mountain bike use between Rogers Pass and Flesher Pass (especially from Anaconda Hill north). Thank you.

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Encl:

Attachment A – CDTS Scoping Comments (December 30, 2010)

Attachment B – CDTS Comments on Proposed Blackfoot Travel Plan (March 1, 2013)